LOS ANGELES BAR BULLETIN

In This Issue

VOL. 21 JULY, 1946 NO. 11

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LOS ANGELES

BAR BULLETIN

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VOL. 21 JULY, 1946 No. 11

A WORD FROM THE PRESIDENT

THE Board of Trustees has adopted a resolution endorsing three county bond issue measures which will be voted on at a special county election on August 6, 1946. The measures provide for bond issues of $19,000,000 for a new county court house and office building, $5,000,000 for new county jail facilities at Castaic, and $3,000,000 for new juvenile detention home and court facilities. The Association's New County Court House Committee, of which Joseph Smith is Chairman, has participated in the planning of the new county court house for several years and has investigated the needs for the county jail facilities and for the juvenile home facilities and the plans of the Board of Supervisors with respect to the improvements. The Committee has reported that there is urgent need for all of the three improvements, that the plans of the Board of Supervisors for the character and location of the improvements are practical and that the cost and financing plans seem sound. The Committee has recommended the endorsement of the three bond issues.

According to present plans the new court house will have approximately 1,100,000 square feet of useable space of which

approximately 570,000 square feet will be devoted to court room facilities and approximately 540,000 square feet will be used for general county legislative and administrative offices. The Board of Law Library Trustees has decided upon a location for the County Law Library separate from the new county court house. The court house building will be located on the west side of Spring Street between the Hall of Justice and Sunset Boulevard.

The county jail plans call for the housing of prisoners under court sentence at Castaic. The buildings, according to present plans, will consist of ten 100-men cell block units. The present County Jail will be used primarily as a receiving unit and for prisoners awaiting trial.

The Association's Juvenile Court Committee has reported the inadequacy of existing juvenile home facilities. Present plans call for the location of the new facilities on a new 45 acre site on Coyote Pass Road. State funds will be available for approximately half the cost of the project.

The Board recommends that lawyers familiarize themselves with the three measures and support them. The Board has made no investigation or recommendations with respect to the other four bond issue measures which will be on the August 6 ballot as the projects are not within the realm of subjects on which the Board is authorized to speak for the Association.

Alex W. Davis

MEMORIAL OF LOS ANGELES BAR ASSOCIATION TO LEONARD B. SLOSSON

When Leonard B. Slosson answered the final summons on June 4, 1946, this community, the Los Angeles Bar Association, The State Bar of California, and his profession lost one of its best loved, most brilliant and able members. To his many friends and associates no memorial or record is necessary, for his fine personality and sweet disposition are enshrined in their hearts and will long endure.

However, Mr. Slosson's services to this community, the Los Angeles Bar Association, The State Bar of California, and his

profession were of such outstanding character that it is appropriate that special mention of them be made in the permanent records of the Los Angeles Bar Association.

Mr. Slosson was born in Sabetha, Kansas, on April 13, 1875, the son of Willis M. and Marian E. (Butler) Slosson. He attended public school in Michigan and graduated from Michigan Military Academy, Orchard Lake, Michigan. He was admitted to the Michigan Bar in 1898, and to the California Bar in 1899.

Mr. Slosson practiced law in Ventura County from 1899 to 1902, and was Deputy County Clerk of that County from 1902 to 1904. He opened his law offices in Los Angeles in 1905. After practicing law in Los Angeles until 1921, he formed a partnership with George Farrand, under the well-known firm name of Farrand & Slosson, which association continued for twenty-five years until Mr. Slosson's retirement on account of ill health two years before his death.

Mr. Slosson always took an active interest in Bar Association work. He served several years on the Board of Trustees of Los Angeles Bar Association and was Senior Vice President when he was elected to the Board of Governors of The State Bar of California in 1928. He was President of The State Bar of California in 1930-1931 and served with distinction in that office.

Mr. Slosson was noted as an exceptionally able trial lawyer. He participated in a great many important litigated cases. He was noted for his painstaking and thorough preparation of cases and skillful presentation of them in court. He was at all times fair and courteous to his opponents and all those with whom he came in contact, and loyal to his friends.

Leonard Slosson's fine, noble character, unfailing kindness, wise counsel, and good influence will long be remembered.

The Secretary is instructed to furnish a copy of this tribute to Mr. Slosson's widow and to his law partner.

ROBERT B. MURPHEY,
HUBERT T. MORROW,
GUY RICHARDS CRUMP,
HENRY G. BODKIN,
NORMAN A. BAILIE, *Chairman*,

Resolutions Committee of the Los Angeles Bar Association.

ANNOUNCEMENT OF DELEGATES TO STATE BAR CONVENTION

ANNOUNCEMENT has been made by President Alex W. Davis of the appointment of the delegates of the Los Angeles Bar Association to the 1946 State Bar Conference. The delegates are as follows:

Stevens Fargo, *Chairman*

Fred Aberle	Walter S. Hilborn
Earl C. Adams	Dee Holder
George Bouchard	Walter F. Keen
Leon B. Brown	Warren E. Libby
William E. Burby	H. E. Lindersmith
Loren A. Butts	Henry W. Low
W. B. Carman, Jr.	James A. McLaughlin
Lee Combs	Albert Mosher
J. Wesley Cupp	Vere Radir Norton
Gene G. Curry	Lawrence L. Otis
Alex W. Davis	Arlo D. Poe
Ray C. Eberhard	Paul Sandmeyer
Gordon Files	Earl D. Killion
Ross C. Fisher	Steadman G. Smith
Sloan Flack	Clyde C. Triplett
Irwin M. Fulop	Gerald F. H. Delamer
Stanley N. Gleis	Noel C. Edwards
William P. Gray	Richard A. Grant

The Chairman, Stevens Fargo, reports that the delegates have collected the records of proceedings of delegates to previous State Conferences, and that considerable study is being given to a number of the issues which, it is anticipated, will come up this year. The delegates have shown themselves to be an extremely active and interested group and numerous sub-committees have been appointed to study particular issues. The particular matters receiving intensive study are:

County Court Plan
The Heirs' Rights Bill
Certain extensions of C. C. P. 2055
Certain suggested changes in the Corporate Securities Act
Certain revisions of pleading and practice matters.

At the initial meeting of the delegates, Ross C. Fisher was elected as first Vice-Chairman, Walter F. Keen as second Vice-Chairman and William P. Gray as Secretary.

Further meetings will be held and the recommendations of the delegates will be submitted to the Board of Trustees to be

later sent to the State Bar. These matters considered by the delegates will undoubtedly be included within the agenda of the Conference.

THE NEW MUNICIPAL LICENSE TAX AS IT AFFECTS ATTORNEYS

By Kenneth K. Wright,
Member of the Bar Bulletin Committee

ON May 29, 1946, Ordinance No. 90555 was adopted amending section 21.190 of the Los Angeles Municipal Code, imposing a license tax upon every person engaged in any trade, calling, occupation, vocation, profession, or other means of livelihood as an independent contractor, and not as an employee, and who is not specifically licensed under other provisions of the code. The definitions of "independent contractor" and "employee" appearing in sections 3353 and 3351 of the Labor Code are adopted for the purposes of the ordinance. Thus, every practicing attorney, other than those engaged in the capacity of an employee, is required to pay a license tax.

The license tax, or fee, is the sum of $12.00 per calendar year, or fractional part thereof, for the first $12,000.00 or less of gross receipts, and the sum of $1.00 per year for each additional $1,000.00, or fractional part thereof, of gross receipts in excess of $12,000.00. The tax in excess of the $12.00 minimum imposed for the calendar year 1946 is determined by and computed upon the gross receipts, if any, for the calendar year 1945, and the license taxes for each subsequent year are based upon the gross receipts of the preceding year.

In the event there were no gross receipts for the year 1945, the applicant must pay the $12.00 minimum and, at the close of the year 1946, must file a written statement setting forth the amount of his actual gross receipts during 1946 and pay an additional tax at the rate of $1.00 per $1,000.00 of gross receipts in excess of $12,000.00 (Municipal Code, section 21.25). After the first year of business, however, there are no adjustments required in the light of actual receipts during the calendar year, but thereafter the license fee is based entirely upon the gross receipts of the preceding year.

The taxes imposed by the amendment are payable for the calendar year 1946 on July 1, and become delinquent on August 31, 1946. The tax for the calendar year 1947 and subsequent years is payable on January 1, and becomes delinquent on the last day of February (Municipal Code, section 21.24.1). If the tax is not paid on or before the delinquency date, a penalty of 10% thereof is imposed, and an additional penalty of 5% of the tax is added at the last day of each calendar month thereafter, but in no case shall the total penalty exceed 50%.

Persons subject to the tax are required to file an application for a license (Form 87) with the City Clerk, setting forth the amount of gross receipts for the year upon which the fee is based, and inclosing the amount of tax due. The license is then mailed to the applicant. All persons subject to the tax should make written or personal application to the City Clerk for Form 87 as he does not propose to canvass the city to determine who are subject to the provisions of the ordinance or to mail the forms except on application therefor.

UNAUTHORIZED PRACTICE GROWING

By Ewell D. Moore,
Member of the Bar Bulletin Committee

SUPPRESSION of unauthorized practice of law is receiving renewed attention throughout the country, not only from the American Bar Association, but state and local bar organizations as well.

The American Bar Association Committee on Unauthorized Practice has recommended that the subject be given emphasis in law school curricula, so that law students may be acquainted with the problem. It has also suggested that, if requested, the committee will recommend qualified men to lecture on the subject as a supplement to the regular course of instruction.

The Washington State Bar Association's Committee has set up a program for the education of the public, in particular, and other professional and business groups as to what constitutes practice of law, and has retained a member of the bar on a part time basis to carry out the program.

The committee's report says: "Comparatively few members of the bar are aware of the nature and extent of practice by unauthorized practitioners; the extent of the damage to the public, . . . or to the volume of law practice which is thereby diverted from. . . . members of the bar."

Recently, in an address in Washington, D. C., J. Howard McGrath, Solicitor General of the United States, said that lawyers are being crowded out of the picture today by economists and representatives of other "newer professions" who are "cropping up everywhere and claim to have new approaches to new problems."

He asks: "What good will it do lawyers five or ten years from now to be members of a profession which has been so negligent as to deny itself the right to be considered expert on anything?"

Although there are more than 400 committees on authorized practice throughout the country, with thousands of members giving their time and efforts to curb the practice, their efforts will be of no avail, he says, unless "lawyers equip themselves to render the service the public requires."

In New Jersey a layman used printed stationery listing his name as "Counselor-at-Law," obtained $100.00 to institute an

action for annulment, issued an alleged subpoena and used a false docket number. He got a year in the penitentiary.

In Wisconsin the State Bar Association's Committee prosecuted a man who admitted that for five years or more he had prepared wills, deeds, mortgages and other legal documents extensively. Only an order to "refrain and desist" resulted in that case.

But in New York, the New York County Lawyers Association filed a petition alleging unlawful practice of one Wenger, obtained a conviction of contempt of court and a fine of $200.00.

The Philadelphia Bar Association's Committee called attention to printed forms for the sale of real estate widely used in that area by real estate agents which authorized the broker selling the property to represent him in connection with the financing, conveyancing and procuring of title insurance. The Philadelphia Bar took it up with the Real Estate Board, which warned the offenders that if the clause were not removed from such agreements, complaints would be filed.

The American Bar Association Committee received a letter from an attorney in a particular state, enclosing an advertisement from a rural newspaper which read:

> "NOTICE
>
> I am going to.................................for the winter months but will be back by Income Tax return time. Your wills, your deeds or contracts. (*Sic*) And remember this I never had a will, deed or contract contested. Pay no attention to what the speaker told you a few weeks ago. Lawyers do make mistakes. I will be back on the job as soon as old grim winter has taken flight. Thank you.
>
> ....
>
> Wills, Deeds and Contracts"

The American Bar Association Committee chairman wrote to the man who signed the above ad and got the following answer:

> "Your letter was forwarded from...
> I expect to return home March 1. I then will take up the dictionary, the statute and the Holy Bible to see if I can search words that will enable me to tell you just what I think of you and *It*. In the meantime, I shall refrain from advising my friends what church they shall attend, nor advising you to go chase yourself, for that would be

'I suppose' unauthorized practice of law. I always supposed lawyers believed every tub should stand on its own bottom, but if you are out of a bottom, you can sit on mine. I never like to see a big boy step upon a little bug. I feel fine."

FROM THE PAST

Quotations and Notes from Early Numbers of the Bar Bulletin

John W. Hart, Leonard Slosson, and Guy R. Crump, appointed as a committee to recommend amendments to the by-laws relating to the plebiscite as to the qualifications for candidates for judicial offices, held several meetings and agreed upon two amendments to Article VIII of the by-laws to be submitted to the Association at its next meeting—May, 1926.

* * * * * *

Some 200 members of the Association enjoyed an interesting meeting at the Alexandria Hotel on May 27. The principal event was a scholarly debate on the California Syndicalism Act. Benjamin F. Bledsoe contended forcibly for a strict enforcement of the Act in its present form. Leon R. Yankwich argued with suasion for repeal or modification of the Act. President Eugene Overton then turned the meeting into an open forum discussion. Interesting talks were given by Wm. Donovan, Tracy Backer, Joseph Ford, and others.—May, 1926.

SHOULD WE HAVE LEGAL INTERNESHIPS?

ATTENTION is again being called to the problem of bridging the gap between the young lawyer's scholastic training in law school and the commencement of actual practice. Perhaps the sharp break in the training of many students and the lapse of time between legal study and practice brought about by the war has helped to focus attention on this situation.

The argument is made that in law, as in medicine and other professions, there should be at least a short period of clinical experience before the start of actual practice in the profession. Many persons, both in the profession and out, feel that it is unfair to the public, as well as to the young practitioner, to turn

him out, usually green and unprepared, without some further period of training.

Judge Dale Souter of Grand Rapids, Michigan, discusses this question of a proposed legal interneship in a recent issue of the *Journal of American Judicature Society.* He points out that although this idea is by no means new, it so far has made little progress.

It probably would be conceded generally that most graduates, including those of the best law schools, upon graduation, have not been prepared adequately to handle matters of actual practice. This would require additional training in the thousand and one aspects of the practitioner's technique. Most graduates understand the law as it is found in the books, but they have not yet acquired training in *how* to practice.

One of the principal problems involved would be whether such period of training should be taken away from the time now required to be spent in the law school, or whether it would be an additional requirement before a license to practice law is given by the State. Undoubtedly, the latter would be favored by most practitioners as the law schools already have a difficult time in giving what they consider to be a proper and full curriculum. There is also the question of how such a period of training or interneship would be supervised. Would it be supervised by the law schools themselves, or by a State Board? Also, what compensation would be given to the young lawyer in training?

This latter problem might be treated similarly to the handling of the Apprentice Training Program for Lawyer Veterans. This plan, developed by the Minnesota State Bar Association, provides that a lawyer veteran taken into a law office for apprentice training will receive, in addition to the $65.00 a month for a single man and $90.00 for a married man allowed by the government, $65.00 a month from his employer at the beginning of the three-year period and an increasing amount until at the end he is being paid $180.00 a month.

Some very careful study and thought could well be given to this problem for an interneship would undoubtedly be approved both by the public and the profession generally. THE LOS ANGELES BAR BULLETIN would welcome any suggestions or views on the general question involved.—F. S. B.

RESOLUTION ADOPTED BY THE BOARD OF TRUSTEES RESPECTING

VINCENT MORGAN

In Vincent Morgan's sudden passing from this life the Bar of Los Angeles County has lost one of its best loved, most brilliant and able members, and a true and loyal friend.

Born in Los Angeles on the site of the present City Hall, Mr. Morgan received his primary education in public and private schools here and attended old St. Vincent's College, now merged with Loyola University. He studied law at University of Souern California Law School, at which institution he later became a teacher. Many a lawyer successfully practicing his profession today owes much of his success to the inspiration of Vincent Morgan's teaching and his emphasis on fairness and ethical practice at all times.

In 1919 Mr. Morgan was appointed Assistant Counsel for the Los Angeles County Flood Control District and a year later became its Chief Counsel. Resigning that office after several years, he resumed private practice as a member of the well-known firm of Hill, Morgan and Bledsoe.

Vincent Morgan was known to Bench and Bar alike as an exceptionally able trial lawyer—fair and courteous to opponents, witnesses and the Court. He was noted for his careful and painstaking preparation of every case which he presented to the Court. He was a skillful cross-examiner but, withal, a courteous one, never taking an unfair advantage of anyone. His splendid personality and sweet disposition endeared him to a host of friends. He was never known to say an unkind word of any human being. It will be hard to fill his place at the Bar and impossible to fill it in the hearts of those who knew him best.

Mr. Morgan was a trustee of Los Angeles Bar Association at the time of his death.

Let this tribute be spread upon the minutes of the Los Angeles Bar Association and copies be presented to his late associates in the practice of the law.

HONORABLE CHARLES S. BURNELL,
Chairman

JAMES H. HOWARD HUGH GORDON
HARRY J. BAUER ALEX MACDONALD

THE OBJECTS AND SOME OF THE TOOLS OF ESTATE PLANNING

By Maynard J. Toll,
of the Los Angeles Bar

THE term "Estate Planning" is in rather frequent use today, and to most people carries a fairly uniform, although not very specific connotation. It is unlikely today that the experience of a life underwriter would be repeated. When suggesting to an acquaintance the need of estate planning, he received the response: "Not in my case; I live in an apartment and have no garden at all."

Although times definitely have changed, there is still merit in redefining and reorienting the term from the standpoint of the objects sought to be accomplished. This paper attempts to state such objects, and following such statement discusses some of the tools or procedures used in gaining the indicated result in any particular case.

The objects of estate planning naturally arrange themselves into three chronological groups: The first are those which relate to the period of the client's continued life; the second relate to the period at and shortly after the client's eventual decease; and the third to an indefinitely long but more remote time after the client's decease.

OBJECTS OF ESTATE PLANNING

The most commonly recognized object of estate planning for the first period may be stated as the optimum utilization of property and income (including available tax savings) for the present and future benefit of the client and his family. In this category fall the client's investment program, including purchase of life insurance either for protection or investment or both, the making of outright gifts and the creation of trusts to reduce the burden of income taxes.

Also pertinent to this first period is the consummation of appropriate arrangements anticipating the possibility of death of a business partner or close business associate. Such an event may seriously impair or even force the termination of an otherwise profitable business enterprise unless the necessity for protection is foreseen and adequate steps taken ahead of time. Even if the consequences do not assume this magnitude, an un-

anticipated and sudden interruption of the continuity of control and operation may prove almost as disastrous.

The second group of objects of estate planning require attention to the type of ownership and the character of the client's assets, and the provisions governing its devolution upon the client's decease. Directing his attention to the period at and immediately after the client's eventual death, the estate planner must attempt to hold administration expenses and death taxes to a minimum; to assure that there will be available sufficient moneys and liquid assets to meet cash requirements; to provide proper protection to the estate against sudden and unnecessary shrinkage of values of property or business interests of such a character that the estate must to some extent depend upon associates for the full realization of such values; and to make certain that death taxes will actually be borne by the funds or beneficiaries contemplated.

The third class of objects relates to a more remote period after the client's death. In this field, the estate planner must work out such a program of gifts, inter-vivos trusts, legacies and testamentary trusts as is best conceived to serve the interests of the client's prospective beneficiaries by affording them financial assistance in adequate amounts at the proper times. This requires in the case of any trust, for example, the fixing of appropriate dates for distributions of corpus, the careful wording of distress clauses or other provisions authorizing the invasion of corpus, and the inclusion of adequate provisions to cover all contingencies within the realm of reasonable possibility. It calls for such an arrangement as will minimize the death taxes upon the subsequent death of the client's beneficiaries, and will produce as low a level of income tax burden as can feasibly be achieved. It also involves provisions to afford the beneficiaries reasonable protection against their own financial mistakes.

NECESSARY PARTIES TO ESTATE PLANNING

The foregoing statement of objectives of estate planning does not purport to be exhaustive. Further thought will bring to mind other necessities to be met. It serves, however, as a foundation for the obvious conclusion that if there is any one man who is thoroughly qualified to perform this entire task without the expert assistance of others, most of us have never

met him. A complete and competent job of estate planning can be done only over a considerable period of time and only as a cooperative and coordinated effort of a number of specialists.

Among these is, of course, included the attorney, as a good measure of the planning task requires legal knowledge, legal advice, and the reduction of conclusions to written legal form. In almost every case life insurance plays a vital role, and the services of a qualified life underwriter are necessary to assure that the maximum utilization of existing insurance is made and that sound advice is obtained with respect to possible additional insurance. The existence of competent investment advice, whether from the client's banker, broker, or professional investment counsellor, is necessarily assumed. In many cases the services of an accountant are indispensable. Finally, in any case where a trust, either inter-vivos or testamentary, is indicated (and it is in most cases of estates of any size), the counsel of the trust officer of a bank or trust company, speaking from a wealth of practical experience in the actual operation of trusts, is essential if a fully acceptable and reliable job is to be done.

LAWYER'S DUTY TO INITIATE PLANNING

This leads naturally to the observation: "What is everyone's business is no one's business." Unfortunately this has been quite true of estate planning as an integrated and completely rounded whole. There has been a marked tendency to complete one or more segments without finishing up the whole in a workmanlike manner. There are increasing indications of a change in this respect. The difficulty has been due chiefly to the lack of a "self-starter." The client has a natural inclination to feel that he and his associates will live forever—or at least that there is plenty of time for personal matters that have no pressing immediacy. The attorney, who must act as the coordinator in any estate planning job, tends to feel that his professional ethics disqualify him from insisting that the task be undertaken and completed. That such a feeling not only is unjustified, but may lead even to unprofessional conduct, is demonstrated by Opinion Number 210 of the Ethics Committee of the American Bar Association:

> "Many events transpire between the date of making a will and the death of the testator. The legal significance of

such occurrences is often of serious consequence, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest. It is our opinion that, where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will."

VALUE OF ESTATE PLANNING TO SMALL ESTATES

Reverting to the various objects of estate planning, it should be understood that these objects are not confined to tax considerations. It might follow that small estates and moderate estates can need some planning service as well as larger estates. For example, the proper use of joint tenancies in an estate of \$10,000 may save as much as \$1000 in probate costs—a saving of 10% of the gross estate. Situations in which joint tenancies serve a useful purpose should not be overlooked, despite the current growing antipathy to this form of ownership. Attention to beneficiary provisions in life insurance policies can produce

a like saving of administration expenses when the poorly-advised client with a small estate has named his executor as beneficiary. In passing, it should be said that there are many cases in which life insurance proceeds should be payable to the executor, though this is generally true only in larger estates.

Another service which can often be rendered to the client with a relatively small estate is careful attention to the use of settlement options in life insurance contracts. The provision by this means of a monthly income is some assurance against expensive blunders by an inexperienced beneficiary, yet costs nothing whatsoever.

The client of relatively small means, all of whose wealth is represented by a partnership interest in a modest business may, of course, be in the most urgent need of advice and assistance from his attorney, and probably his life underwriter. Although the business may produce a comfortable living for the partners during their lifetimes, the dependants of a deceased partner may find themselves suddenly "out in the cold" so far as realization upon any but tangible value is concerned, unless adequate attention is given to the problem at the proper time.

Medium sized estates also present many challenges to the planner. Suppose, for a moment, an estate of $300,000, all of which is stock of a closely held corporation except the family home and $40,000 of life insurance which is payable to the widow in a life income, with no right to commute the future payments. The corporation has a substantial earned surplus, and plenty of cash. Even if the home is sold the cash requirements of the estate remain high. The monthly income produced by the insurance is needed by the dependent family for current living expenses. Sale of part of the stock under pressure is difficult and likely to produce a relatively unfavorable price. Payment of a dividend large enough to put the estate in funds will result in a disproportionately high income tax, not only to the estate but to the other stockholder or stockholders. A loan by the corporation to the estate-stockholder raises the spectre of a penalty surtax on the corporation under section 102 of the Internal Revenue Code. What to do? Whatever it is, it should have been done, and the contingency provided for, prior to the stockholder's decease.

COMMON FEATURES OF ESTATE PLANNING

Without attempting in the compass of this paper to cover all phases of the subject, or to treat in more than a most cursory manner those phases which are adverted to, it may be useful to outline some of the rather common features of an estate planning job. These have been arranged in three categories: first, the character of the property composing the estate, and in what form of ownership it is held; second, inter-vivos transfers that may be made; and third, the preparation of a satisfactory will.

1. CHARACTER OF THE PROPERTY, AND HOW IT IS HELD.

Having estimated the size of the taxable estate, and from that the amount of taxes, expenses and other charges that must be settled in cash, the question immediately arises: How is this amount of cash to be acquired in a relatively short period, without financial sacrifice?

It is not a unique experience, in analyzing moderate to large estates, to find that by the time those assets have been sold for which a ready and favorable market will exist, the only property left is not only extremely difficult to liquidate, but also a very poor income producer. By this process, the assets eventually passing to the dependents are often such as they have no business owning, but which they have no reasonable chance of altering into more satisfactory investments except at what appears to be a tremendous loss.

An analysis of the estates probated in three California counties in 1941 showed the following average distribution of assets:[1]

Cash	12.19%
Insurance	1.06%
Bonds	14.75%
Stocks	40.35%
Notes and mortgages	5.18%
Real property	20.29%
Miscellaneous	6.18%

Assuming that the total cash requirements of the estate amount to 40%, usually the case, the bonds, and about a third of the stocks would go to meet these demands. What started

[1]Booklet on "Estate Conservation" published in 1945 by Title Insurance and Trust Company, Los Angeles.

as a balanced investment portfolio would wind up seriously out of balance. Although the severity of the result will depend to a great extent upon general financial conditions prevailing at and for a period after death, the result can, under adverse conditions, be so extremely serious that reasonable precautionary moves must be taken.

Before leaving the subject of liquid vs. frozen assets, it will do no harm to mention again that the mere existence of life insurance does not guarantee liquidity to the extent of the proceeds thereof payable on death. One must inquire further, as the irrevocable election by the insured of a particular optional mode of settlement may have frozen the proceeds most effectively.

2. Type of Property Ownership.

A study of the type of ownership by which the property is held must be undertaken, with a view to establishing the effect of death with respect to such property and determining whether the form of ownership should be changed. To the multifarious problems falling under this heading in other states, the planner

in a community property state is blessed with another and special set of brain-twisters. What part of the estate is community property? Should steps be taken at once to convert such property into some other type of ownership? If so, what amount of gift tax burden will be incurred immediately in order to save, probably, some larger amount of estate tax which will have to be borne at some indefinite future date.

Aside from the frosting enjoyed by those who practice in community property states, there are a wealth of underlying questions revolving about joint tenancies which have caused a rather general tendency to mistrust and avoid this form of property holding. The basis for this is the rule that property of which the decedent was a joint tenant is to be included in his taxable estate to the extent of his proportionate contribution to the purchase thereof. This, coupled with the natural decision by the Revenue Agent against the taxpayer in any doubtful case, and the presumption of correctness of such decision, produces a kind of "heads you win, tails I lose" effect for the taxpayer, of somewhat the same nature as the present unfortunate predicament in which community property finds itself for estate tax purposes. The burden of proof which the taxpayer faces often is insurmountable, owing to the absence of satisfactory and convincing records.

Hence the wisdom in many cases of terminating joint tenancies and either creating in their places tenancies in common, or physically dividing the property into separate ownerships. This apparently can be done without any gift tax consequences. But the planner should beware of the possibility that property which of record is held by husband and wife in joint tenancy is in law actually community property; for although division of true joint tenancy property does not constitute a taxable gift, the Treasury Department Regulations specifically provide that division between husband and wife of community property does involve a taxable gift unless a half was "economically attributable" to each, which is seldom the case.

The taxability for estate tax purposes of true joint tenancy property of husband and wife which was purchased with community funds is apparently governed by section 81.22 of Regulations 105, as amended by T. D. 5239 on March 10, 1943. According to this regulation, the contributor to the purchase of

such property is the spouse to whom is economically attributable the community funds used in its purchase. Thus, if the community funds so used were earned by the husband, the joint tenancy property would be fully taxed in his estate, but no part would be included in the wife's taxable estate if she should predecease him.

INSURANCE PLANNING

As has already been indicated, the provisions of insurance contracts upon the life of the client must be carefully studied and made to fit snugly and effectively into any plan that is developed. The former federal exemption from death taxes up to $40,000 of life insurance has of course been revoked, although the California exemption of $50,000 remains.

The general rule, for federal purposes, is that the proceeds of insurance on the decedent's life, payable to beneficiaries other than his estate, are included in his taxable estate if:

> (1) Premiums were paid, directly or indirectly, by the decedent; in which event the percentage of the proceeds so to be included is determined by the proportion of the total premiums so paid by him; it being understood that:
>
> > (a) Premiums paid by the decedent on or before January 10, 1941, are not counted as "paid by him" if he never owned an incident of ownership in the policy after that date;
> >
> > (b) Decedent's powers as manager of the community in a community property state do constitute an "incident of ownership"; and
> >
> > (c) A reversionary interest is an "incident of ownership";

or

> (2) Decedent possessed at death an incident of ownership, exercisable alone or in conjunction with any other person; it being understood that:
>
> > (a) Decedent's powers as manager of the community are such an incident; but
> >
> > (b) For this purpose a reversionary interest is *not* such an incident.

The Regulations further provide that the key phrase "directly or indirectly," used in connection with the source of premium payments, is "intended to be broad in scope." Many hopefully conceived plans whereby the wife pays the premiums upon con-

tracts insuring the husband's life, using part of her household allowance or other funds originating from the husband, appear doomed to failure by this language.

Cases in which insurance premiums are paid with community funds present neat situations, when fitted into the language of section 811(g)(4) of the Internal Revenue Code. The conclusions appear to be as follows:

(1) Insurance upon the husband's life.

(a) If premiums are paid out of the husband's earnings.

The proceeds are taxable in the husband's estate. The value of the policy is not taxed in the wife's estate, if she should predecease her husband, as apparently the wife is not regarded as having an incident of ownership despite the fact that the insurance contract is community property.

(b) If premiums are paid out of the wife's earnings.

The value of the policy at the wife's decease (prior to the husband's decease) is included in her taxable estate. The proceeds may, it seems, be taxable in the husband's estate on the ground that since the contract is community property his power as manager of the community is an incident of ownership. The question arises whether he can effectively surrender his managerial power over this particular asset, thus avoiding the tax result. No definite answer seems possible.

(2) Insurance upon the wife's life.

(a) If premiums are paid out of the husband's earnings.

Upon the husband's prior decease, the value of the contract will be included in his estate. If the wife should predecease her husband apparently the proceeds are not part of her estate.

(b) If premiums are paid out of the wife's earnings.

The value would perhaps be taxable as part of the husband's estate on the "incident of ownership" theory arising from managerial powers over community property. The proceeds would certainly be taxable in the event of the wife's decease.

The foregoing is illustrative of the complications arising from the interplay of community property concepts with a tax system the general form of which is patterned to fit a different kind of property ownership. The conclusions somewhat hesitantly offered are based on the assumption that the insured had, so far as possible, avoided incidents of ownership in the insurance contracts.

The definition of an incident of ownership presents difficulties of its own. In general it means any economic benefit under the insurance contract. A more detailed definition is given in the Regulations in an effort toward further certainty.

Reference has been made heretofore to the importance of carefully checking, and if necessary revising, the designation of beneficiaries. The three choices that are feasible in most cases are first, the estate of the insured; second, designated individual beneficiaries; and third, trustees who are to receive the proceeds and hold them in trust pursuant to the terms of a trust instrument. The choice to be made is governed by the primary purpose that the particular policy is given to serve in the general estate plan. The selection of a trust arrangement for the proceeds is ordinarily dictated by a desire to provide a distribution plan which the available settlement options are not sufficiently flexible to afford, or by a wish to permit the estate to receive liquid funds from this source by means of loans to the estate by the trustees or purchase by the trust of estate assets. Frequently a combination of these two motives is served by such an arrangement. The latter purpose can be accomplished without tax disadvantages if the trust instrument is properly drawn.

Before leaving the subject of life insurance the vital necessity should again be emphasized of giving proper attention to the selection of settlement options in contracts of insurance the proceeds of which are payable to named beneficiaries. Again, the primary aim of the insurance will control the choice between various options. A decision in favor of monthly payments over an extended period, with no right of commutation, will afford sometimes sorely needed protection to the beneficiary.

PROTECTION OF BUSINESS INTERESTS

In any study of a client's assets, particular care and attention must be given to his business interests that are held in the form of sole proprietorships, partnership interests, and closely held corporate stocks. The realizable values of such assets are peculiarly sensitive to death, and adequate planning for the eventuality before its occurrence is a "must" of the first order. The granting in the will of adequate powers to personal representatives, the provision for a continuity of management personnel and policies, the execution of fair and reasonable "buy and sell

agreements," the underwriting of such agreements by life insurance or other means if necessary, and the acquisition of "key man insurance," are only a few examples of the kind of thing that should be given consideration and either provided or discarded as unnecessary or impractical.

The existence in any estate of a majority or controlling stock interest in a corporation is a warning flag to an estate planner. This factor may in some cases lead an attorney to recommend cashing a part of the holding through a public sale and distribution, so that the move can be made under the client's guidance while he is still alive, at a time and in circumstances of his own choosing, rather than after his decease and under the threat of a tax-payment deadline. If there is no prospect of facing a forced liquidation, or such a prospect can be avoided by the purchase of additional life insurance, still it may be most important to protect the continuity of management of the corporation by a carefully worked-out trust in the will. It has happened before, and will happen again, that well-meaning and sincere but inexperienced beneficiaries of an estate destroy or seriously impair the worth of a business enterprise by radical changes in management, personnel and policies that could have been precluded by trust clauses drawn with reasonable foresight. All this is part of the estate planning job.

INTER-VIVOS TRANSFERS

Such transfers fall into three categories outright or absolute gifts, revocable trusts, and irrevocable trusts. Of these, only the second is without tax significance, but that particular category has its usefulness in some circumstances. Compared with the alternative of a testamentary trust, it does save administration costs; and in some situations it serves a desirable end in connection with family arangements. For example, a widower with children, planning to remarry but reluctant to relinquish management of or the income from any part of his estate, may wish to place a portion of his property in a revocable trust which provides that the corpus shall go to his children, rather than his wife, upon his decease. He thereby establishes a pattern which is more palatable, and safer from attack, than a similar arrangement by will.

In addition to the advantages other than tax reduction, and the potential saving in estate and inheritance taxes, there may

be available a substantial income tax saving during the donor's remaining life. If the donor is in a 70% top income tax bracket, while the donee has very little income and would encounter only a 30% top bracket with the additional income from the gift, there is a potential saving of approximately 40% of the annual income. This motive for a gift, incidentally, has been regarded by the courts as some armor against a subsequent contention that the transfer was one made in contemplation of death.

This same income tax saving is particularly apparent in the case of an irrevocable trust, the income of which is to be accumulated in whole or part. To the extent of the accumulation, the income is taxable to the trust, and thus a new taxpayer, taxable at relatively low brackets, has been created—an especially desirable result when all members of the family are subject to the higher income tax brackets.

In making a gift of such a character that the property of which it is composed will not be subject thereafter to estate tax, two problems are encountered. The first is the gift tax. Whether transfers are desirable in such an amount as will incur substantial gift tax depends upon several factors. One is the comparison of the estate tax rate which would apply to the property (the highest applicable estate tax brackets) with the effective gift tax rate. Although the federal gift tax is, in each bracket, three-fourths of the estate tax rate for the same bracket, the differential is ordinarily very much greater, as the property may be removed from a high estate tax bracket at the cost only of being subjected to the beginning gift tax rate. The

differential should of course be appropriately discounted, as the gift tax must be paid shortly after the gift, whereas the estate tax is deferred until after the prospective donor's decease. Added to the rate differential between the two taxes is the fact that certain gift tax exemptions are allowed by law, and unless they are employed by means of inter-vivos transfers they will be absolutely lost.

The second problem is the troublesome possibility that a gift by a living person may eventually be held to have been made in contemplation of death, and, therefore, be added to the taxable estate unon the donor's decease. The general principle in this connection, to be gleaned from the myriad of cases on the subject (many of which appear to be irreconcilable), is that if the dominant motives for the gift relate to the anticipated period of the donor's continued life the transfer is not one in contemplation of death, with the opposite result if such dominant motives relate to the period at or after his death. It is often impossible at the time of a transfer to predict with any reasonable degree of assurance whether the gift will be attacked on this ground, and if so whether such attack will be successful. Ordinarily, the longer the donor lives after the transfer, the less successful will be the contention of contemplation of death; but this mere lapse of time is far from absolute protection.

Even when the Commissioner is successful in his attack on this ground some saving, often substantial, remains. In such case although the estate otherwise taxable is reduced by both the amount of the gift and the amount of the gift tax paid, only the former is added back to the taxable estate, and a credit against the estate tax is allowed for the gift tax so paid.

SPECIAL PROBLEMS IN IRREVOCABLE TRUSTS

Many special problems arise in connection with transfers by means of irrevocable trusts, to some of which attention can be called here only by the briefest of references. Any attempt by the settlor to preserve management and investment control, or to reserve other powers, immediately raises the spectre of the well known *Clifford*[2] case. The Treasury's official interpretation of that decision and its wake of later cases is embodied in T. D. 5488, which is required reading for all who undertake to draft any

[2]*Helvering v. Clifford,* 309 U. S. 331, 84 L. Ed. 788.

but the very simplest irrevocable trust. The equally familiar *Hallock*[3] case, supplemented by *Commissioner v. Estate of Field*[4] and various lower court decisions, emphasizes the necessity not only of avoiding express reversionary clauses in favor of the settlor, but also of incorporating provisions sufficient to preclude the possibility of a reversion occurring by operation of law in any conceivable circumstances. These references will serve only as a few examples, among many, of the pitfalls that await.

Gifts of life insurance also present their special set of questions. Ordinarily it will be found necessary to transfer all the incidents of ownership, not merely title to the policy itself. In the case of a life insurance contract which carries disability benefits, is it necessary to transfer these also? Although no certain answer can be given, it may be suggested that the disability provision is in essence a separate contract of insurance, and not a part of the life insurance contract.

Payment of any consideration by the donee usually has only the effect of reducing to that extent the taxable gift, but in the

[3]*Helvering v. Hallock*, 309 U. S. 106, 84 L. Ed. 604.
[4]*Commissioner v. Estate of Field*, 324 U. S. 113, 89 L. Ed. 786.

case of life insurance it will have very serious income tax consequences. The ordinary rule that life insurance proceeds are not subject to income tax carries an exception in the case of life insurance transferred for a valuable consideration; there the proceeds are fully subject to income tax, to the extent they exceed the consideration paid plus the permiums paid by the transferee.

For the purpose of determining what portion of the premiums were paid by the decedent, where there has been a transfer of the insurance for a valuable consideration,the Regulations provide that there shall be excluded from this category that ratio of the premiums actually paid by the insured prior to the transfer which the amount paid by the transferee as consideration bears to the value of the policy at the time of the transfer.

For the purpose of determining the taxable amount of the gift when life insurance is transferred, a distinction is to be made between a single premium contract and an annual premium contract. The Supreme Court has established, in *Guggenheim v. Rasquin,*[5] that in the former case the amount of the gift is the replacement cost of the policy. In the latter case, the Regulations state that the amount given is the interpolated terminal reserve at the last prior premium payment date, plus the unearned portion of any prepaid premium at the date of the gift.

Two further observations on the subject of life insurance transfers. First, if the gift is made in such terms that the donee must survive the insured in order that he or his estate may receive the proceeds, the gift is one of a future interest, and the annual gift tax exclusion of $3000 (in the case of the California gift tax, $4000) is not allowable. Second, such transfers would seem particularly vulnerable to the contemplation of death argument, although the few cases in point do not seem to justify this fear in any large degree.

PREPARATION OF A WILL

It is elementary that a carefully planned will is a vital part of any estate planning undertaking. Often this is all that need be done. Many of the subjects which must be considered in the drafting of a proper will have already been sufficiently covered. At this point it is necessary to add only a few comments before closing.

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[5]*Guggenheim v. Rasquin,* 312 U. S. 254, 85 L. Ed. 813.

The employment of a testamentary trust to avoid unnecessary taxes on the death of beneficiaries is a familiar, tested, and highly useful device. Carrying it to the limits allowed by the rule against restraints on alienation in an effort to obtain maximum tax savings may in many cases be highly questionable from all standpoints but that of taxation. The decision as to how far to go is a matter of individual judgment in each instance. The inclusion of distress clauses and powers to invade corpus, and their degree of liberality, are also matters which must be tailored to fit the special circumstances that exist.

TAX SAVINGS AND CHARITABLE BEQUESTS

In connection with this last subject, the draftsman must be alert to the effect of such clauses on a final remainder to charity. Anticipated estate and inheritance tax savings by means of charitable deductions may be completely lost because of such provisions even though it seems perfectly apparent that the bulk of the corpus will eventually go to charity. Consciousness of the problem, coupled with reasonable limitations, may result in giving sufficient flexibility and at the same time preserving a most valuable tax deduction.

One subject, which may be of the highest importance, is often overlooked completely. It should be given proper attention not only in preparing a will, but also in preparing trust instruments. This is the matter of allocation of the tax burden between the various portions of the taxable estate. The taxable estate may consist not only of the property passing under a will or by intestacy, but also of property held in joint tenancy, community property, property previously transferred in contemplation of death, the corpus of taxable trusts, property subject to a power of appointment, life insurance proceeds, and perhaps other classifications of property. The anticipated distribution of property among various beneficiaries may be seriously altered or even largely defeated unless attention is given to the allocation of the tax burden among these various types of taxable property.

Section 821 of the Internal Revenue Code provides expressly that unless the will indicates a contrary intent the recipient of life insurance proceeds and the person in whose favor a power of appointment is exercised shall contribute their fair share to the payment of the estate tax. There is no such express provision with respect to the other categories of taxable property,

but the section does provide that if estate tax is paid by the recipient (other than the executor) or part of the estate, such person is entitled to reimbursement therefor, to the end that the tax be borne as if paid out of the estate before distribution.

Section 970 to 977 of the California Probate Code provide in effect that, subject to the terms of the will (or to the terms of an inter-vivos instrument as to the apportionment of taxes within the fund governed thereby) the estate tax is to be equitably apportioned between all the beneficiaries.

There thus appears to be a conflict between the two codes. How is such conflict to be resolved? In *Riggs v. Del Drago*, 317 U. S. 95, the question was the burden of the tax as between recipients of specific bequests and the residuary legatee, the will being silent on this point. New York had a statute similar to that of California referred to above. The New York Court of Appeals held the state statute invalid as repugnant to Internal Revenue Code Section 821, which it said must control the incidence of the federal estate tax. The Supreme Court reversed this decision, saying that the Internal Revenue Code leaves the states free to allocate the estate tax burden between beneficiaries of the property passing through the executor's hands.

An implication arises that a state law with respect to allocation of estate tax is invalid as to property which does not pass through the executor's hands. This implication may not be necessary, but at best the basic question is still undecided. The obvious moral, since both state and federal laws permit control by the decedent, is to anticipate the problem and obviate it by proper draftsmanship of trust instruments and wills.

CONCLUSION

One of the principal purposes of this article has been to emphasize the fact that an attorney engaged in estate planning must of necessity secure the assistance of experts for all the different aspects of the problem. It has also been pointed out that it is necessary for the attorney to be familiar not only with all phases of his client's personal affairs and business but it is desirable that the attorney, together with the other specialists involved, be able to project himself into the future and plan for the inevitable. It is hoped that this article has served to indicate some of the more fundamental problems which may arise, and the situations which may confront the attorney and which should be kept in mind constantly while planning a client's estate.

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